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IN THE

# Supreme Court of the United States

October Term, 1958

No. 311

RAY EDWARD GONDRON and DANIEL ELCHUK,
*Petitioners,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR REHEARING AND MOTION TO REMAND

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## PETITION FOR REHEARING AND MOTION TO REMAND

Petitioners pray for a rehearing of the order of the Court entered on October 20, 1958, denying their petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The opinion of the court below affirming the convictions (App. 21-26) has now been reported at 256 F. 2d 205. The prior opinion of the court below reversing the convictions and remanding for a new trial (App. 28-29) appears at 242 F. 2d 147.

### I.

### Preliminary Statement of Reasons for Rehearing.

Petitioners are aware of the limited grounds available to them on this rehearing. However, the interests of justice require this second presentation to the Court because the

underlying issues in the case which warrant the intervention of this Court were not previously presented. These issues raise important constitutional questions which profoundly affect the administration of the criminal law in the federal courts.

In our first petition we unsuccessfully sought review of the case on the sole ground (Pet. 8) that, "Where a valid verdict rendered by a jury regularly obtained and empaneled upon a valid and sufficient indictment, is set aside upon the application of the prosecuting attorney an accused will be protected from a second prosecution for the same offense, unless he acquiesces in such application." We do not reiterate that ground here. Indeed, in this petition we assume (but do not concede) that if an appellant asks for a new trial, his immunity from the jeopardy of a new trial does not turn upon the identity of the party which obtains the result of a new trial. We insist, however, that the double jeopardy protection does attach where, as here, the government has improperly prevented the appellate court from ordering a judgment of acquittal for lack of evidence.

## II.

## Questions Presented.

1. After the appeal had been filed and before argument, the government successfully moved in the court below that the case be remanded, without consideration of petitioners' appeal, including their attack upon the sufficiency of the evidence. This motion (App. 39-40) sought a new trial solely because the government's chief witness (Record on First Appeal, 14), a customs agent "testified to facts which differed in several respects from the testimony given by other Customs Agents. Some of it appears questionable aside from the fact that it neither be affirmed nor denied by other witnesses" (App. 39). This motion was unpar-

ticularized, unsworn, unsupported by affidavit, not acquiesced in by the defendants, not based upon newly-discovered evidence, or a claim of recantation. Nor did the motion state why relief was not sought until after the filing of the appeal, in what respects the testimony was material, or that the government believed it to be truthful at the time it was given. A question is presented whether the decision of the court below remanding the case on the bare allegations of the government's motion is authorized by *Mesarosh v. United States*, 321 U. S. 1 or *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115.

2. If the court below improperly remanded the case on the motion of the government, thus frustrating petitioners' attack upon the sufficiency of the evidence, did a second prosecution:

(a) Invade either the double-jeopardy or the due process protections of the Fifth Amendment, or

(b) Constitute a departure from proper standards of the administration of the criminal law in the federal courts.

3. A question is presented whether the case should not now be remanded to determine if the testimony of the customs agent was, in fact, truthful but was attacked in bad faith and in deception of the court below, or if, although tainted, it was acquiesced in and knowingly used by the government to obtain the convictions and then repudiated in order to thwart petitioners' appeal.

4. The court below expressly refused to pass on petitioners' contentions, including those seeking an order of acquittal, because of the motion filed by the government. Despite this fact, the court, in order to foreclose a claim of former jeopardy, equated the relief which petitioners could have obtained with that sought by the government. Does *Bryan v. United States*, 338 U. S. 552, upon which the court

below relied, authorize an appellate court, without reviewing the record or considering appellants' contentions seeking acquittal, to remand a case for a new trial on the hypothesis that it would have ordered a remand if it had considered the attack on the sufficiency of the evidence?

5. If an appellate court has the power thus preclusively to dispose of a contention without considering it, was the power properly exercised in this case where the government had impeached the integrity of the entire record.

## III.

## Reasons Which Could Have Been But Were Not Previously Advanced for Granting the Writ.

1. If petitioners had been acquitted on their first appeal, that acquittal would bar a second trial under the double jeopardy protection of the Fifth Amendment. *Sapir v. United States*, 348 U. S. 373. In this case, petitioners were not acquitted. We think it clear, however, that their right to an acquittal, and hence to a termination of their jeopardy, was unjustifiably destroyed by the government.

2. In challenging the truthfulness of its own witness, the government relied upon *Mesarosh v. United States*, *supra*. But, in *Mesarosh*, it should be emphasized at the outset, the appellants' contentions that the evidence was insufficient to sustain their convictions were fully reviewed by the Court of Appeals for the Third Circuit, 223 F. 2d 449. It was only after a petition for certiorari had been filed in this Court that the government sought a remand. Moreover, the government's motion to remand specified that it was based upon newly discovered evidence about Mazzei's testimony in proceedings subsequent to the trial and that the government believed the testimony was truthful at the time it was given. Motion to Remand, *Mesarosh v. United States*, pp. 2, 6, ftn. 1. Further the government

took pains to explain that it had not slept on its doubts about Mazzei's testimony but had immediately sought to share them with the Court. Motion to Remand, *Mesarosh v. United States*, p. 6, ftn. 1. Finally, the materiality of the testimony and its impact upon the case were fully aired. Motion to Remand, p. 2, *Mesarosh v. United States*, 325 U. S. at 12, ftn. 6. Similarly, in *United States v. Shotwell Mfg. Co.*, 355 U. S. 233, the government's allegations concerning the testimony of the witnesses sought to be impeached were highly particularized and supported by affidavits and amounted to a charge of fraud on the court. And the Court was explicit in assuring the respondents that they would be denied review of their claim of insufficiency of the evidence only if the government's contentions with respect to the suppression motion were established.

3. Here, a sharply contrasted situation is presented. The government's motion (App. 30-41) sought to foreclose a review of appellants' contentions that their convictions were based upon insufficient evidence. And this effort to abort their appeal was based upon grounds so flimsy as to be almost grotesque. The entire motion boils down to a contention that the testimony of one agent differed from the testimony of other agents and that some of it was neither affirmed nor denied by other witnesses. It also mysteriously and without particularization referred to the fact that "some of his testimony appears questionable." Although the government claimed in the court below that the performance of this witness polluted the administration of justice, and compromised the dignity of the United States, he is still employed as a customs agent. Indeed, counsel has been informed that this agent did not know of the existence of the motion until November 6, 1958 when it was read to him over the telephone. See attached affidavit. Is this an example of "commendable candor" (*Mesarosh v. United States, supra*, at 8) or of tampering with the judicial process?

Nor can cryptic references to the "tainted" character of the testimony or the invocation of the "dignity of the United States" redeem the motion and endow it with substance. On the face of it—and without regard to questions of bad faith—the motion seeks a new trial through the device, not open to either side in a criminal case, of impeaching after judgment, the credibility of a witness upon the basis of his testimony at the trial. Such a ground for a new trial is not merely unjustified; it is unheard of. As the Court pointed out in *Mesarosh*, *supra*, at 9, even newly-discovered evidence affecting the credibility of a witness is no ground for a new trial when sought by a defendant.

4. *Mesarosh* shields the administration of justice in a criminal trial from infection. Here *Mesarosh* has been transformed into a sword to curtail the rights of these petitioners. Certainly it was never intended by the Court that the *Mesarosh* case would be construed, as it has been in effect here, to amend the Rules of Criminal Procedure so as to make unilaterally available to the government a means of foreclosing appeal and of forcing a defendant to run the gauntlet again when it seems convenient or opportune to do so.

This Court insisted in the *Shotwell* case, *supra*, that a "convincing showing is of course necessary to bring these principles [of the *Mesarosh* case] into play." 355 U. S. at 242. Such showing was obviously not made here. It seems to us that review is imperative to clarify and limit the circumstances under which the principles of the *Mesarosh* case are operative. We earnestly submit that the power to obtain a new trial on *Mesarosh* grounds should not be left at large.

5. The dangers which are threatened by the interpretation of *Mesarosh* adopted by the court below are demonstrated by the record in this case. Although the indictment invokes not one but two separate and quite different statutes (R. 5-6), the first trial judge wholly failed to charge essential elements of the offenses as defined in these statutes

(Record on First Appeal, 205-211 and compare R. 132-134). This failure was fatal error. Moreover, petitioners presented a strong challenge to the sufficiency of the evidence (Brief on Appeal, No. 16,334, pp. 12-15). By shutting off their appeal and obtaining a new trial the government thus had nothing to lose and everything to gain. The granting of the government motion would produce a result which was in any event inevitable, would cut off appellate review of the claim of insufficiency and enable the government to bolster its case in a second trial.

The Court in *Mesarosh* has defined with some particularity the problems and dangers which a motion of the kind involved here raises. Yet the court below was apparently unwilling to order the government to ventilate the details of the alleged untruthfulness of the Agent Diosdado either by a "truth hearing" on remand (compare the government's Motion to Remand, p. 6, in the *Mesarosh* case) or through its own inquiry. But it was hardly proper to respect a governmental interest in privacy when to do so might not only disfigure the sound administration of justice but also jeopardize basic rights of the defendants to an acquittal either because the convictions were the product of knowing use of tainted testimony at the trial or because of an appellate showing of lack of evidence to support an acquittal.

6. The reliance of the motion upon the record (rather than upon post-trial occurrences) inherently stirs doubts about the prosecution's conduct and motives. We are unable to find anything in the record of the first trial that could conceivably have persuaded the lower court that Diosdado "testified to facts" (App. 39) which resulted in a taint of the record.

If the testimony was not tainted, a serious question arises whether the motion was filed in bad faith and in deception of the court below for the purposes already referred to above. On the other hand, if Diosdado lied or concealed vital facts, petitioners could well have been con-

victed by testimony the tainted character of which was known to the government at the trial. Compare, *Alcorta v. Texas*, 355 U. S. 28. And the record makes this more than a speculation for Agent Diosdado, whose allegedly tainted testimony was the basis of the motion to remand, was the government witness who prepared the case, sat at counsel table at the trial and who, by virtue of his position as "client" was excepted, on motion of the government, from the rule excluding witnesses from the courtroom.*

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* The following colloquy in the Record on the First Appeal is of significance (pp. 14-15):

"Mr. Nahas: At this time if the Court please, the defendant moves that the rule be invoked as to all witnesses, with no exceptions.

"Mr. Short: Your Honor, at this time the Government would request that Mr. Diosdado and the chemist be allowed to remain in the courtroom. We will not insist on the chemist over the objection of the defendants.

"The Court: Agent Diosdado is the agent who worked up the investigation of the case?

"Mr. Short: That's correct, your Honor.

"The Court: It is the understanding of the Court that under such circumstances the agent sits in the position of the client; the lawyer is entitled to have his client by his side, as the lawyer is not directly interested in the case. He is representing the case of the client before the Court. Does the defendant urge any reason why we should make any exception in this case?

"Mr. Nahas: The defendant does urge, if the Court please. His reasoning is as follows: that Mr. Diosdado, as the Court has so ably stated, has worked this case and therefore he becomes a very necessary party and would be in a position to know and hear that which is said and spoken by each and every witness throughout the case. And, accordingly, the defendant feels that Mr. Diosdado would be in a position to guide the Government's case, and at this time again the defendants insist on their original motion that the rule be invoked with no exceptions as to any of the witnesses.

"The Court: The rule for the exclusion of witnesses is invoked, except that Agent Diosdado may remain in the courtroom at all times, and the witness Howard Bennett, who is strictly a technical witness, will be allowed to remain in the courtroom at all times."

The government's motion thus cried out for further inquiry. The granting of the motion by the court below was wrong. Its failure to probe the bases for the motion challenges the responsibility of this Court for the supervision of the administration of the criminal law in the federal courts. At a very minimum this responsibility requires that the Court should now remand the case for such inquiry.

7. The Court's intervention is particularly warranted because the expansion of the government's power to obtain a new trial in a criminal case creates new pressures upon the historic and important protection of double jeopardy. By preventing, on essentially trivial grounds, an appellant from terminating his jeopardy, the government can harass him on the installment plan indefinitely by discovering new blemishes in the record which prevent a disposition of the appeal. This Court must make it clear that the great protection against double jeopardy is not to be made a plaything of legal maneuver.

8. It is too late to argue that an appellant does not normally sacrifice his claim of double jeopardy by seeking a new trial. But the waiver—if such it may be called—is not absolute, and must, as in the case of all restraints upon constitutional protections, be narrowly construed. *Johnson v. Zerbst*, 304 U. S. 458. The mere invocation of the appellate process is no waiver (*Green v. United States*, 355 U. S. 184); nor can it be said that an appellant agrees to a second prosecution which results from the government's wrongful frustration of his efforts to terminate the jeopardy of the first. So to hold would make waiver an irrational pretext for wiping out the protection of double jeopardy. When a defendant makes impossible a valid judgment, his judgment of acquittal is not former jeopardy. (See American Law Institute, *Double Jeopardy*, Section 11.) So, too, the government's wrongful prolongation of jeopardy must bar a second trial. This result is required not only by

fundamental fairness but by the root policy of the double jeopardy protection against endless harassment of a defendant.

9. We believe that the lower court agrees with our contention that a remand on the government's motion without consideration of the appeal raised a double jeopardy problem. It thus sought to apply therapy to this problem by combining its remand for a new trial with a hypothetical disposition of the appeal. More specifically, the court below, while expressly refusing to pass on petitioners' contentions that the judgments were invalid for insufficiency (App. 28), nevertheless ruled that even if the evidence were insufficient it would have confined the reversal to one ordering a new trial. It relied upon *Bryan* v. *United States*, *supra*, as authority for its ruling.

It must be emphasized that the lower court's construction and application of the *Bryan* case to this case is the foundation of the denial of petitioners' double jeopardy plea. It was the lower court's reading of the *Bryan* case which enabled it to equate the relief granted in the first instance on the government's motion with that "requested and obtained by appellants" (App. 29). Since appellants had thus hypothetically "obtained" the relief to which they were entitled, they waived the jeopardy of a second trial and could not claim that the court's response to the government's motion had improperly prolonged or enlarged their jeopardy by frustrating their appeal. Similarly, when the double jeopardy contention was subsequently made, Judge Allred relied upon the language of the Court of Appeals to reach the conclusion that petitioner Elchuk, "got the relief he asked—reversal of the judgment—* * * the Court of Appeals was very careful in the language used in reversing this case and foreclosed the claim now made by Elchuk" (159 F. Supp. 689; App. 36-37). And when the case came to it a second time, the Court of Appeals restated the rationale implied in its prior decision that a plea of

double jeopardy is not available to "one who has sought and obtained reversal and new trial to obtain and keep the benefit without the burden of the new trial" (App. 24). Thus, if *Bryan* does not give a court the power to rule speculatively and hypothetically on an appeal attacking the sufficiency of the evidence, the court did not "foreclose the claim" of double jeopardy.

10. The lower court, it will be recalled, expressly refused to review appellants' contentions challenging the sufficiency of the evidence (App. 28). Its stricture that it would not have ordered an acquittal had it reviewed appellants' contentions is thus purely speculative in nature. The *Bryan* case construes 28 U. S. C., Section 2106 to empower an appellate court to enter judgment for a new trial even where it is of the view that the evidence is insufficient to support the conviction. But this is a far cry from holding that a court has the power to dispose of a claim of insufficiency by remand for a new trial without considering it at all. In the *Bryan* case, the lower court carefully considered appellants' challenge to the sufficiency of the evidence and only after such careful consideration ordered a new trial rather than an entry of a judgment of acquittal. 175 F. 2d 223. Surely, the *Bryan* case does not arm an appellate court with authority to dispose of a challenge to the sufficiency of the evidence by remand rather than entry of a judgment of acquittal when, as here, it has refrained from reviewing the sufficiency contentions.

11. And the Court of Appeals could not possibly have reviewed appellants' contentions by examining the record because the record was challenged by the government itself. How could the Court of Appeals determine that appellants' contentions would merit only a reversal, when it knew that the government had repudiated its chief witness and was contending that "the evidence as a whole was inseparable in the jury room and we cannot speculate as to what impressed the jury most strongly?" (App. 40). Thus, even

if the *Bryan* case gives a Court of Appeals the discretion to render a contingent judgment of reversal on appellants' challenge to the sufficiency of the evidence, it could hardly exercise such discretion in this case.

12. Finally, in contrast to the *Bryan* case, the wrongful action of the government frustrated petitioners' appeal. This decisive difference, it seems to us, makes inapplicable here the ruling in the *Bryan* case, relied on by the government in its Brief in Opposition, p. 4, that the petitioner there would not suffer double jeopardy by a second trial. Nor can the availability to petitioners of a plea of double jeopardy be made to turn upon the failure to move for rehearing in the Court of Appeals. The failure to seek a rehearing was hardly acquiescence in the result. The hard fact is that petitioners refused to join in the government's motion and pressed their appeal both in their briefs and in oral argument. They were required to do no more.

## Conclusion

This case raises important and troublesome questions concerning the scope and applicability of both the *Mesarosh* and *Bryan* cases. These reasons and the reasons stated above require that the petition for writ of certiorari be granted, the decision below reversed, and the indictment dismissed.

In the alternative, the petition for writ of certiorari should be granted for the reasons above stated and the case remanded to the District Court for inquiry into the government's motion to remand.

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## Certificate of Counsel

I certify that the within and foregoing Petition for Rehearing and Motion to Remand is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioners although not previously presented.

FRANK J. DONNER,
*Of Counsel for Petitioners.*

## Affidavit of M. Gabriel Nahas, Jr.

STATE OF TEXAS }
COUNTY OF HARRIS } ss.:

Before me, the undersigned notary public, this day personally appeared M. GABRIEL NAHAS, JR., personally known to me, and who being by me first duly sworn, did state on his oath the following:

My name is M. Gabriel Nahas, Jr. I am a member of the Texas Bar and of the Bar of the Supreme Court of the United States. I am and have been for many years practicing law in the city of Houston, Texas.

I was counsel for the defendants in that certain cause lately pending in the United States District Court for the Southern District of Texas, Laredo Division, wherein the United States of America was plaintiff and Ray Edward Gondron and Daniel Elchuk were defendants, numbered 17,271 on the criminal docket of that court. I represented the defendants in their first trial, which began on the 19th day of September, 1956, in said cause, in the said district court. I was counsel for them on their appeal from their conviction following the said first trial. I was also counsel for said defendants and represented them in their second trial and in their second appeal from their second conviction, on their petition for the writ of certiorari to the Supreme Court of the United States, numbered 331 on the docket of that court, and in their petition for a rehearing of the order denying their said petition for the writ of certiorari.

I further state under oath that I know one Cesario Diosdado, who, at the time of the first trial of petitioners was a customs agent stationed at Laredo, Texas, and who testified on behalf of the government in said trial. I further know that Mr. Diosdado is still employed by the cus-

toms bureau of the United States Government and is stationed at the port of Key West, Florida.

My authority for this sworn statement is a telephone conversation I had this day with the said Cesario Diosdado himself, at his residence telephone number in Key West, Florida, (CYpress 4-1693) from my office number in Houston (CApitol 2-0670).

I further state under oath that in my said telephone conversation with Mr. Diosdado I informed him of the motion filed by the government pending the petitioner's first appeal (Appendix G to petitioner's petition for the writ of certiorari, page 39, et seq.), and read him the motion verbatim. It is my understanding from the statement made by Mr. Diosdado in my telephone conversation with him this was the first knowledge he had that the government had filed such motion and he expressed great surprise that it had been done.

M. GABRIEL NAHAS, JR.

SUBSCRIBED AND SWORN TO BEFORE ME by the said M. Gabriel Nahas, Jr., this 8th day of November, 1958.

JOE OVERSTREET
Notary Public in and for
Harris County, Texas

[SEAL]